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Before the  
Federal Communications Commission  
Washington, D.C. 20554

FCC 92-536

In the Matter of: )  
 )  
Request by TV 14, Inc., ) MM Docket No. 92-295  
to Amend Section 76.51 of the ) RM-8016  
Commission's Rules to Include )  
Rome, Georgia, in the Atlanta, )  
Georgia, Television Market )

NOTICE OF PROPOSED RULE MAKING

Adopted: December 4, 1992 Released: December 8, 1992

Comment Date: January 6, 1993  
Reply Comment Date: January 19, 1993

By the Commission:

1. Before the Commission is a Petition for Rule Making filed by TV 14, Inc. ("TV 14"), licensee of WTLK(TV), Channel 14 (Independent), Rome, Georgia, seeking to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the Atlanta, Georgia, television market to "Atlanta-Rome, Georgia." Public Notice of the filing of TV 14's petition was given on June 23, 1992. Other than TV 14's comments in support of the requested rulemaking proceeding, no responsive pleadings were received.

BACKGROUND

2. TV 14's instant petition continues its efforts to include WTLK in the Atlanta television market. In a previous decision, TV 14, Inc., 6 FCC Rcd 7234 (1991), the Commission granted TV 14's request to include WTLK in the Atlanta market for purposes of Section 73.658(m) of the Commission's Rules relating to territorial exclusivity. As a result of that action, WTLK is able to assert nonnetwork program exclusivity rights against other television stations in the Atlanta market. TV 14 now contends that it is necessary to formally redesignate the Atlanta market as the Atlanta-Rome market in order that WTLK may be considered a local station in the Atlanta area under the cable compulsory copyright license.

3. Specifically, TV 14 states that despite the Commission's recent determination regarding WTLK's competitive position in the subject market,

some Atlanta-area cable systems are "uncomfortable" claiming the station as a local signal (and therefore not subject to distant signal copyright fees) under the compulsory copyright license, 17 U.S.C. § 111. Due to this lingering question as to their liability for copyright fees, Atlanta market cable systems are reportedly unwilling to carry WTLK. TV 14 notes that under the compulsory license, a station is considered a "local signal" for purposes of a cable operator's compensation liability based, in part, on market designations set forth in Section 76.51 of the Commission's Rules. In the case of WTLK, TV 14 maintains that although the Commission has determined that the station is local for purposes of Section 73.658(m) territorial exclusivity, the absence of a formal amendment of Section 76.51 to include Rome in a hyphenated Atlanta market leaves some question for Atlanta-area cable systems as to whether the station is a "local signal" under the compulsory license.<sup>1</sup> TV 14 acknowledges that the Commission is considering whether (and if so, how) to update the Section 76.51 listing of market designations,<sup>2</sup> but contends that immediate action is necessary to facilitate cable carriage of WTLK and thus give that station an opportunity to remain viable in the Atlanta market in which it competes. In that regard, TV 14 notes that when it obtained relief from the territorial exclusivity rule, the Commission specifically concluded that it would be "counterproductive to put this station at risk by awaiting the completion of the pending rulemaking".<sup>3</sup> TV 14 argues that the same logic applies to the instant request, and that relief is justified in light of the Commission's previous recognition of WTLK's competitive position in the Atlanta market.

4. As to formal redesignation of the market, TV 14 maintains that its

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<sup>1</sup> TV 14 states that it filed a request with the United States Copyright Office seeking a declaratory ruling that, given the FCC's determination that WTLK was local in Atlanta for programming purposes, it should also be considered local for purposes of compulsory copyright compensation. TV 14 reports, however, that the Copyright Office determined that the Commission's action with respect to Section 73.658(m) territorial exclusivity had no effect on the statutorily mandated mechanics of the compulsory licensing scheme, which is based on the market designations contained in Section 76.51 of the Commission's Rules. Accordingly, the Copyright Office declined to act on TV 14's request.

<sup>2</sup> Further Notice of Proposed Rulemaking in Gen. Docket No. 87-24, 3 FCC Rcd. 6171 (1988). That rulemaking generally concerns a review of the scope of the territorial and cable television exclusivity rules and the market designations used for purposes of those rules, and related issues involving market designations and the compulsory copyright license. See 3 FCC Rcd at 6176, n.15. We note that the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385 (Cable Act of 1992), requires the Commission to make necessary revisions to Section 76.51 of the Commission's Rules, the list of television markets, in connection with a rulemaking proceeding on must-carry. That proceeding is going forward on a separate track.

<sup>3</sup> TV 14, Inc., 6 FCC Rcd at 7235.

previous request for relief from the territorial exclusivity rule demonstrates that it meets the criteria for hyphenation of the Atlanta market. Specifically, it asserts that WTLK places a city grade signal over Atlanta and that the station's Grade B signal contour substantially overlaps those of all Atlanta stations; that ratings services and local media (as well as the Commission) already consider WTLK to be a part of the Atlanta market; and that syndicators charge the station "full Atlanta rates" for programming.

#### DISCUSSION

5. The top 100 television markets, including hyphenated markets, are those specified in Section 76.51 of the Commission's Rules.<sup>4</sup> This market list is not only used to determine territorial exclusivity rights under Section 73.658(m), but also helps define the scope of compulsory copyright license liability for cable operators. See 17 U.S.C. §111(f). The "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. See CATV-Non Network Agreements, 46 FCC 2d 892, 898 (1974). Redesignation of the market as requested in this case will permit Atlanta-area cable systems to carry WTLK on an equal basis with other television stations in the market without incurring "distant signal" copyright liability. It would also extend the area in which Atlanta stations are considered local signals under the market definition provisions of the Commission's Rules, and thus redefine the area in which Atlanta stations may assert syndicated exclusivity and network nonduplication rights.

6. The Commission has defined a hyphenated television market as one characterized by more than one major population center supporting all stations in the market including competing stations licensed to different cities within that market area. See Cable Television Report & Order, 36 FCC 2d 143, 176 (1972). Market hyphenation "helps equalize competition" where, due to population, geographic, or other factors, some stations licensed to different communities beyond the Grade B contours of those stations in a given television market compete for economic support. Id. In evaluating past requests for hyphenation of a market, the Commission has considered among the following factors as relevant to its examination: (1) the distance between the proposed community and the existing designated communities; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. See, e.g., Major Television Markets (Fresno-Visalia, Calif.), 57 RR 2d 1122 (1985). Each of these factors assists the Commission to evaluate individual market conditions consistently with the underlying competitive purpose of the market

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<sup>4</sup> The Atlanta market is currently ranked eighteenth in Section 76.51. For markets not listed in Section 76.51, the Commission refers to the most recent ARB Television Market Analysis.

hyphenation rule to delineate areas where stations can and do, both actually and logically, compete.

7. Based on the facts presented, we believe that a sufficient case for market hyphenation has been set forth so that this proposal should be tested through the rulemaking process and comment requested from interested parties. Accordingly, we seek comment on amending the list of television markets set forth in Section 76.51 by hyphenating the Atlanta market to include Rome as requested by TV 14. It appears from the information before us that WTLK and the stations in the Atlanta market have coverage areas that substantially overlap and that these stations do, in fact, compete for audiences with each other throughout much of the proposed combined market area. Arbitron already lists Rome within the Atlanta "area of dominant influence." Moreover, TV 14 references and reasserts its previous showing that program syndicators and market-area program listings consider WTLK local in the market, and claims such facts further underscore that WTLK and the other Atlanta market stations are economically interdependent and competitive. Although Rome and Atlanta are some 56 miles distant and the facilities of the Rome and Atlanta stations are not collocated, the Commission has previously concluded, in a slightly different context, that the actual location of the transmitters of the stations involved render the stations unavoidably competitive.<sup>5</sup>

8. Accordingly, based on our stated policy considerations, we tentatively conclude that Section 76.51 of the Commission's Rules should be amended by adding Rome to the Atlanta market designation, and we seek comment on this tentative conclusion.

#### ADMINISTRATIVE MATTERS

##### Ex Parte Rules -- Non-Restricted Proceeding

9. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

##### Comment Information

10. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before January 6, 1993, and reply comments on or before January 19, 1993. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission,

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<sup>5</sup> 6 FCC Rcd at 7235.

Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

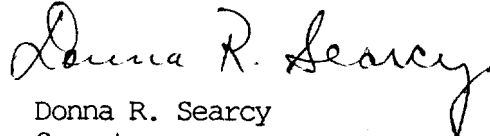
Initial Regulatory Flexibility Analysis

11. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. A few number of television licensees and permittees will be affected by the proposed rule amendment. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

Additional Information

12. For additional information on this proceeding, contact Alan E. Aronowitz, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

  
Donna R. Searcy  
Secretary